

Legal form(s) beyond capitalism?

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The Corporation, Law and Capitalism is an important book. With a historical-materialist focus on the legal configuration of the corporation as a legal entity, Grietje Baars shows in an exemplary way the role of law in the shaping of capitalism. As their starting point, Baars refers to a historical materialism based on the authors [Pashukanis](#) and [Miéville](#). Accordingly, Baars assumes that property is the *raison d'être* of law (p. 19). Property is to be understood as the basic norm of every legal system (p. 29). Against this background, Baars tells a fascinating story of the formation of the basic elements of the legal form of the company in (mainly English) national law as well as international law. They then trace how international criminal law has systematically obscured the responsibility of corporations and promoted their position as actors in the international context, primarily by analyzing significant historical and current court cases. Finally, they show how current discourses of *corporate social responsibility* continue this trend.

I would like to raise three questions, all of which stem from the understanding of law, legal form and capitalism that underpin Grietje Baars' book. It is therefore necessary to briefly recapitulate Grietje Baars' point of view. As already mentioned, the starting point of their investigation is an understanding of the commodity form and the legal form based on Pashukanis:

„Yet, since law, in the commodity form theory of law, is an inherently capitalist instrument (qua form, regardless even of content) based and built on the Grundnorm of private property ownership and inhering between formally equal subjects, it cannot but serve the interest of capital and reflect the underlying economic relations” (p. 29).

This also has consequences for their assessment of a possible emancipatory potential of law:

“[...] the form of law is not an empty vessel into which we can pour any (progressive or even socialist) content. Our resistance must turn against the concept of private property, against capitalism and against law: away from legal emancipation toward human emancipation” (p. 379).

Against this background, I would like to discuss three aspects of this understanding of the commodity form and legal form with respect to books depiction of the historical formation of law (1.), the constitutive role of law for economic relations (2.), and the emancipatory potential of law (3.).

1. the historical formation of the law

In Chapter 2, the book tells a fascinating legal history of the corporation. As Grietje Baars rightly points out, especially in business law, far too little attention is paid to historical considerations. However, Baars' narrative is very much focused on

specifically capitalist aspects of the development of law, starting from the premise that property is the basic norm of any legal system. However, it seems quite questionable whether we can actually narrow all aspects of the development of law historically to such a specific concept of property. The legal historian [Harold Berman, for example](#), describes Canon Law as the first legal system in Europe. Is property really the basic norm of Canon Law? In addition, the history of law is full of different forms, varieties and concepts of property. Private property – the focal point of Baars' study – is only one of these forms. In addition to private property there have always existed forms of [social property](#). The *Allmende* is but one example of such *alternative* legal configurations of property. The current debate on (*global*) *Commons* builds on these alternative forms of property. For this reason, legal configurations of property are also [conceivable](#) for a democratic socialism. Restricting the concept of law to a concept whose *raison d'être* is private property may not do justice to the diverse history of law beyond capitalism. If we look beyond euro-centric histories of law, we can find aspects of a different kind of law. The notions of the *Derecho Alternativo* and of [emancipatory legal pluralism are only two prominent examples](#).

2. the constitutive role of law

Newly emerging Law and Political Economy approaches add to such a complex and multifaceted understanding of law (see for example [Grewal, Harvard Law Review, 128 \(2014\), 626](#); [Pistor, The Code of Capital, 2019](#); and the contributions on [lpeblog.org](#)). These approaches share the belief in the constitutive role of law for economic relations. [Property](#), [contract](#), [market](#), [money](#), and also the corporation have no meaning beyond their respective legal configurations. They ever only exist as legal configurations. Precisely for this reason, however, these configurations are also historically changeable and politically transformable. This also means that law is not wholly determined by specific economic conditions (in the sense of Pashukanis). The concept of law is not necessarily identical with its specific instantiation in capitalist society. Baars focuses their inquiry on the development of the *corporation* in British law and correctly states that the basic characteristics of the *corporation* had already developed in various countries in the mid-nineteenth century following the British model (p. 67). This development does indeed appear to be of exemplary significance. Yet, this does not mean that this legal form of the corporation is not open to change and variation. In capitalist law, we can find a variety of different corporate laws and they differ, at times substantially, in the way they construe legal personality and liability rules. We can find inter alia various forms of employee participation, various forms of *piercing of the corporate veil* (more recently, for example, in supply chains). In addition, there are alternative legal forms such as certain forms of cooperatives, which seem to operate beyond corporate capitalism. An approach that is focused on one particular type of incorporation in capitalist law – as important as this type might be for the understanding of law in capitalism – runs the risk of losing sight of these *varieties* and alternative forms of law. This might also limit the view on the relationship of law and capitalism. In his seminal study Kalyan Sanyal argues that our understanding of capitalism also needs to take into account those sectors of the economy beyond the capitalist mode of production, because they form an integral part of capitalism ([Sanyal, Rethinking Capitalist Development 2007](#)). In this sense, I would argue that we also need to

account for existing alternative and deviant forms of law and legal forms beyond its capitalist variants.

3. the emancipatory potential of law

Grietje Baars thus limits the concept of legal form to its capitalist manifestation. Yet, a historical materialism does not necessarily imply that the form of law is synonymous with its capitalist variation. Some materialist theories of law instead assume a relative independence of law and the legal form (for example Franz Neumann). As a consequence, those materialist theories of law [recognise](#) an emancipatory potential of law. Grietje Baars denies – as I already mentioned – such an emancipatory potential of law. According to Baars, the legal form is not an “empty vessel into which we can pour any (progressive or even socialist) content” (p. 379). An emancipatory project must therefore necessarily be directed against the law and against the legal form. I think that the legal form is indeed not an “empty vessel”, but it is also not an ontological constant. [Another law](#), a transcendence of the capitalist legal form is possible. Baars themselves demands: “Our imagination and our organising must turn towards the creation of alternative forms of relating, producing, and distributing” (p. 379). We will not achieve this task by abolishing law (see [Fischer-Lescano, legal force 2013](#)). This is in my view the result of the debate on the relationship of law and violence which emanated from Walter Benjamins *Critique of Violence*. The task then is to search for emancipatory forms of law and to find legal strategies to bring about [another law](#).

Grietje Baars has presented an innovative study with many (for me) important findings. My question, however, would be whether we should restrict our concept of law to a specifically capitalist manifestation from the outset. For in this way we run the risk of losing sight of precisely those alternative, remote, suppressed and counter-hegemonic elements of the law that hold important potential for an emancipatory notion of law.

Grietje Baars, [The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy](#) (Brill 2019 & Haymarket 2020).

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